

No. 14406

United States
Court of Appeals
for the Ninth Circuit

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Appellant,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Eastern Division.

FILED

OCT 1 1954

PAUL D. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Solicitor;

BESSIE MARGOLIN,

Chief of Appellate Litigation;

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GEORGE L. BARNARD,

ALBAUGH, BLOEM, BARNARD & SMITH,

201 Rogers Building,

Idaho Falls, Idaho,

Attorney for Appellee.



In the United States District Court for the
District of Idaho, Eastern Division

Civil Action—File No. 1810

LLOYD A. MASHBURN, Acting Secretary of
Labor, United States Department of Labor,

Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Defendant.

COMPLAINT

I.

Plaintiff, Lloyd A. Mashburn, Acting Secretary of Labor, United States Department of Labor, brings this action to recover from defendant, Idaho Lumber Company, Inc., a corporation, unpaid overtime compensation due its employees LaVern F. (Bud) Westfall, Sylvester Kramp, Clifford C. Pierce, and Robert Horn, under the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.), hereinafter referred to as the Act.

II.

Defendant Idaho Lumber Company, Inc., is, and at all times hereinafter mentioned was, a corporation licensed to do business under the laws of the State of Idaho and engaged in doing business in

said State and having a place of business, sawmill and planing mill at Salmon, Lemhi County, Idaho, where it is engaged in the production, sale and distribution of green and finished lumber for interstate commerce.

III.

(a) Jurisdiction of this action is conferred upon the court by Section 16 (c) of the Act, and by U.S.C. Ti. 28, Sec. 1337.

(b) Under the provisions of Reorganization Plan No. 6, dated March 13, 1950, effective March 24, 1950, issued under the Reorganization Act of 1949, U.S.C. Ti. 5, Sec. 133 (z), et seq., the functions of the Administrator of the Wage and Hour Division, United States Department of Labor, under the Fair Labor Standards Act have been transferred to the Secretary of Labor.

IV.

For his first cause of action herein Plaintiff alleges:

(a) LaVern F. (Bud) Westfall has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed LaVern F. (Bud) Westfall, from September 16, 1951, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in

interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above LaVern F. (Bud) Westfall was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said LaVern F. (Bud) Westfall in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$683.49, which amount has been demanded of defendant and remains unpaid.

V.

For his second cause of action herein Plaintiff alleges:

(a) Sylvester Kramp has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Sylvester Kramp from September 16, 1951, to December 5, 1952, in the production of

lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Sylvester Kramp was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Sylvester Kramp in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$246.21, which amount has been demanded of defendant and remains unpaid.

VI.

For his third cause of action herein Plaintiff alleges:

(a) Clifford C. Pierce has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Clifford C. Pierce from November 13, 1951, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Clifford C. Pierce was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Clifford C. Pierce in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$146.28, which amount has been demanded of defendant and remains unpaid.

VII.

For his fourth cause of action herein Plaintiff alleges:

(a) Robert Horn has filed with plaintiff a written request to bring this action, claiming unpaid overtime compensation from defendant.

(b) Defendant, Idaho Lumber Company, Inc., employed Robert Horn from January 4, 1952, to December 5, 1952, in the production of lumber for interstate commerce. Substantial quantities of said lumber were shipped, delivered, transported, offered for transportation and sold in interstate commerce from defendant's said place of business to other states, and were shipped, delivered, and sold with knowledge that shipment, delivery, and transportation thereof in interstate commerce from Idaho to places in other states was intended. At all times mentioned above Robert Horn was engaged in the production of goods for interstate commerce within the meaning of the Act, as aforesaid.

(c) During the said period defendant employed the said Robert Horn in the production of goods for interstate commerce within the meaning of the Act, as aforesaid, for work weeks longer than 40 hours and failed and refused to compensate him for such employment in excess of 40 hours in such work weeks at a rate not less than one and one-half times the regular rate at which he was employed, contrary to Section 7 of the Act.

(d) As a result of said violations of Section 7 of the Act by defendant, there is due and owing from defendant the sum of \$236.20, which amount has been demanded of defendant and remains unpaid.

Wherefore, plaintiff demands judgment against the defendant in the total amount of \$1312.18, together with interest thereon and costs.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, United States Department of
Labor, Attorneys for Plaintiff.

[Endorsed]: Filed September 17, 1953.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant, Idaho Lumber
Company, Inc.:

You are hereby summoned and required to serve upon Kenneth C. Robertson, Regional Attorney, United States Department of Labor, plaintiff's attorney, whose address is Room 144, Federal Office Building, Fulton and Leavenworth Streets, San Francisco 2, California, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so,

judgment by default will be taken against you for the relief demanded in the complaint.

Date: Sept. 17, 1953.

[Seal] ED. M. BRYAN,
Clerk of Court.

By /s/ LONA MANSEC,
Deputy Clerk.

Return on Service of Writ attached.

[Endorsed]: Filed September 29, 1953.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint of the plaintiff herein, defendant admits, denies and alleges, as follows:

I.

Denies each and every allegation, matter and thing in said complaint contained, save and except as hereinafter specifically admitted, qualified, or explained.

II.

Admits the allegations of said complaint as to the jurisdiction of this court and the plaintiff's capacity to sue.

III.

Admits that at the times mentioned in said complaint, defendant was and is a corporation, organ-

ized under the laws of the State of Idaho, doing business therein, and operating a sawmill and planing mill at Salmon, Idaho, engaged in the production, sale and distribution of lumber, but alleges that at all times mentioned in said complaint, the defendant was engaged in such production, sale and distribution and lumber exclusively and entirely for intrastate commerce.

IV.

Admits that LaVern F. (Bud) Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn were employed by defendant during the periods mentioned in said complaint, and admits that defendant did not pay such employees at a rate of one and one-half times the regular rate at which they were employed, but alleges that said employees were each and all engaged in the production for lumber for intrastate commerce only, and that none of said employees were engaged in the production of lumber for interstate commerce at any time during their said periods of employment.

Wherefore, defendant prays that this action be dismissed, and that defendant have such other relief as may be proper.

ALBAUGH, BLOEM,
BARNARD & SMITH,

By /s/ GEO. L. BARNARD,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 12, 1953.

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION
OF PLAINTIFF

It is hereby stipulated by and between plaintiff and defendant that on October 9, 1953, Lloyd A. Mashburn resigned as Acting Secretary of Labor, and was succeeded in the office of Secretary of Labor on October 9, 1953, by James P. Mitchell, his duly qualified successor, and that said James P. Mitchell has assumed all the functions of the Secretary of Labor, United States Department of Labor, under the Fair Labor Standards Act of 1938, as amended. It is agreed that an order may be entered herein substituting James P. Mitchell in place and stead of Lloyd A. Mashburn as plaintiff in this action, without prejudice to the proceedings already had herein, and this cause may be continued and maintained by said James P. Mitchell as successor to said Lloyd A. Mashburn.

Dated November 10, 1953.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, Attorneys for Plaintiff, United
States Department of Labor.

/s/ GEO. L. BARNARD,
Attorney for Defendant.

ORDER

It is ordered that James P. Mitchell, Secretary of Labor, United States Department of Labor, be, and he is hereby substituted as plaintiff herein in place of Lloyd A. Mashburn, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said James P. Mitchell as successor to Lloyd A. Mashburn.

Dated Nov. 20th, 1953.

/s/ CHASE A. CLARK,
Judge of the United States
District Court.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—NOVEMBER 20, 1953

Counsel for respective parties having stipulated and requested the Court for an order directing the Clerk to show this cause of action filed in the Eastern Division, and the Court being advised, ordered the case transferred to the Eastern Division for all further proceedings.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between plaintiff and defendant:

1. That the title of the Court in the caption of the Complaint be amended by striking the word "Southern" and substituting therefor the word "Eastern."

2. That the title of the Court in the caption of the Answer be amended by striking the word "Southern" and substituting therefor the word "Eastern."

3. The Clerk of the Court is requested to correct his records so as to show this case to be in the United States District Court for the District of Idaho, Eastern Division.

Dated November 10, 1953.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ CLYDE D. BIRD, JR.,
Associate Attorney, Attorneys for Plaintiff, United
States Department of Labor.

/s/ GEO. L. BARNARD,
Attorney for Defendant.

ORDER

It is so ordered.

Date: Nov. 20, 1953.

/s/ CHASE A. CLARK,
Judge of the United States
District Court.

[Endorsed]: Filed November 20, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY—DECEMBER 10, 1953

This cause came on for trial before the Court sitting without a jury; the plaintiff being represented by Clyde D. Bird, Jr., and defendant represented by George L. Barnard.

Certain facts were stipulated into the record and, upon motion of counsel, it was ordered that the complaint be amended by interlineation.

Elbert Shaw and Arthur B. Johnson were sworn and examined as witnesses, and other evidence was introduced, on the part of the plaintiff, and here the plaintiff rests.

Arthur B. Johnson and Rula Johnson were sworn and examined as witnesses on the part of the defendant, and here the defendant rests and both sides close.

It was agreed that argument be submitted on brief, plaintiff to have 30 days to file opening brief,

defendant 30 days to answer, and plaintiff 15 days to reply.

It was ordered that the Clerk release the exhibits to the attorneys for preparation of briefs.

[Title of District Court and Cause.]

MEMORANDUM

Clark, District Judge.

This matter came on for trial before the Court, sitting without a jury, at Pocatello, Idaho, on the 10th day of December, 1953. Witnesses were sworn and examined and evidence was introduced on behalf of the parties. At the conclusion of the trial the matter was taken under advisement by the Court. Thereafter, briefs were filed by respective counsel and the same have been fully considered by the Court.

After a full consideration of the evidence and the law, this Court is of the opinion that the defendant was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938, Title 29 U.S.C. Sec. 201 et seq.

Counsel for the defendant may prepare Findings of Fact and Conclusions of Law and Judgment in accordance with the Court's opinion herein, submitting the original thereof to the Court for its approval and serving a copy on counsel for Plaintiff.

Dated this 9th day of March, 1954.

[Endorsed]: Filed March 9, 1954.

In the United States District Court for the
District of Idaho, Eastern Division
File No. 1810

JAMES P. MITCHELL, SECRETARY OF
LABOR, UNITED STATES OF DEPART-
MENT OF LABOR,

Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on for trial before the undersigned Judge of said Court, without a jury, the 10th day of December, 1953, at Pocatello, in said District of Idaho, on the complaint of the plaintiff to recover alleged overtime wages for the benefit of LaVern F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn, former employees of the defendant, under the provisions of the Fair Labor Standards Act of 1938, (Act of June 25, 1938, c.676, 52 Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.), Clyde D. Bird, Jr., appearing as counsel for the plaintiff, and Geo. L. Barnard, of the firm of Albaugh, Bloem, Barnard & Smith, appearing as counsel for the defendant.

Evidence was introduced by the parties in support of the pleadings, briefs were presented by counsel, and the cause submitted to the Court.

Now, after considering the evidence, the files and records of said action, and the briefs of counsel, the Court finds as follows:

I.

That the plaintiff, James P. Mitchell, is the Secretary of Labor, United States Department of Labor, and is authorized to bring actions of this nature under the provisions of said Fair Labor Standards Act, and that this Court has jurisdiction of such action by virtue of the provisions of said Act.

II.

That defendant, Idaho Lumber Company, Inc., is, and at all times referred to in said complaint was, a corporation organized and existing under and by virtue of the laws of the State of Idaho, engaged in business in said State, in operating a sawmill and planing mill at Salmon, Idaho, in the production, sale and distribution of green and finished lumber.

III.

That said LaVern F. Westfall, Sylvester Kramp, Clifford C. Pierce and Robert Horn were employed by the defendant in its said sawmill and planing mill during the times mentioned in said complaint, and that each of them has filed with plaintiff a written request to bring this action, pursuant to the provisions of Section 16(c) of the Fair Labor Standards Act.

IV.

That at all times mentioned in said complaint, defendants production, sale and distribution of lumber and the products made by defendant therefrom

was in and for intrastate commerce within the State of Idaho; that none of said lumber or products was produced in or for interstate commerce within the meaning of the Fair Labor Standards Act; that the only transaction entered into by defendant wherein any of said lumber or productions went outside the State of Idaho during the times mentioned in said complaint was the making of warehouse equipment consisting of a quantity of bean boxes and pallets to Rogers Brothers Seed Company, an Idaho corporation, for use in its seed processing plants, some of which are located outside the State of Idaho, which bean boxes and pallets were made by defendant for said Rogers Brothers Seed Company under a single contract, constituting an isolated transaction outside of the ordinary and usual course of defendant's business and operations, and, as such, did not constitute production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

V.

That none of the defendant's employees for whose benefit this action is brought were engaged in the production of goods for interstate commerce during any of the times mentioned in said complaint.

Conclusions of Law

As Conclusions of Law, the Court finds that defendant is entitled to the decree of this Court that the Court has no jurisdiction to grant any relief to plaintiff in this action under the Fair Labor Standards Act, and that this action be dismissed, on the merits.

Judgment

From the foregoing, it is therefore Ordered, Adjudged and Decreed that this Court has no jurisdiction to grant any relief to plaintiff in this action and that the same be, and hereby is, in all things dismissed, on the merits.

Dated this 30th day of March, 1954.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed March 30, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that James P. Mitchell, Secretary of Labor, United States Department of Labor, plaintiff herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the whole of the final judgment entered in this proceeding on March 30, 1954.

Dated: May . . ., 1954.

/s/ STUART ROTHMAN,

Solicitor;

/s/ BESSIE MARGOLIN,

Chief of Appellate Litigation;

/s/ KENNETH C. ROBERTSON,

Regional Attorney, United States Department of Labor, Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to August 17, 1954.

Dated this 25th day of June, 1954.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed June 28, 1954.

In the United States District Court for the
District of Idaho, Eastern Division
No. 1810

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances:

STUART ROTHMAN, ESQ.,
KENNETH C. ROBERTSON, ESQ.,
CLYDE D. BIRD, JR., ESQ.,
Attorneys for Plaintiff.

ALBAUGH BLOEM, BARNARD & SMITH,
GEORGE L. BARNARD, ESQ.,
Attorneys for Defendant.

December 10, 1954

Mr. Bird: In this case, if the Court please, I think we are able to stipulate on some of the facts.

The Court: Perhaps you would like some time to get together on the stipulation.

Mr. Bird: On this case, Mr. Barnard, you will admit that the employees named in the complaint worked for the defendant at its Salmon sawmill producing lumber and that their hours of work and their pay is shown correctly on the Defendant's records.

Mr. Barnard: It may be so stipulated.

Mr. Bird: And you will agree that they asked the Government to collect their overtime.

Mr. Barnard: Yes, we will agree to that.

Mr. Bird: And that they filed written request with the Secretary of Labor?

Mr. Barnard: Yes, it is so stipulated.

Mr. Bird: So the only question before the Court is whether or not the lumber which these employees produced was produced for interstate commerce.

The Court: Now, I am just wondering if you could not stipulate as to what the facts are in regard to that.

Mr. Barnard: Perhaps if we might have a few minutes——

Mr. Bird: ——I think we can to a large part of the facts. [2*]

The Court: As I recall this matter there were certain shipments made by Riley Atkinson Company to firms outside of the State. Maybe you have the evidence here that can clear this up anyway.

Mr. Bird: I think the evidence will be short in this matter.

Mr. Bird: Do you people have any objections to the mathematical computations.

Mr. Barnard: No, I think we will stipulate that the computations are correct.

ELBERT SHAW

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Bird:

Q. What is your name? A. Elbert Shaw.

Q. You are an investigator for the wage and hour division?

A. That's right, for the United States Department of Labor.

Q. The Bailiff has shown you some computation sheets, did you prepare those?

A. I did.

Q. Where did you get the information?

A. From the payroll records of the Idaho Lumber Company for their employees at the sawmill at Salmon, Idaho. [3]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Elbert Shaw.)

Q. What did you do with that information, how did you go about compiling it?

A. I entered the total hours worked each week as indicated in the payrolls, I entered the total amounts that had been paid, I computed the total due the worker in the amount of one-half the hourly rate indicated, at which the employee had been paid for all the hours in excess of forty in each work week.

Q. So you have a column of figures which indicated the amount due each employee for each work week if he was engaged in the production of good in interstate commerce? A. Yes.

Mr. Bird: There may be a question as to whether we should introduce the primary records as well as this summary.

The Court: I shouldn't think that would be necessary.

Mr. Barnard: No, I don't believe that is necessary.

Mr. Bird: Mr. Barnard, you would agree that the information which he copied off the record is correct?

Mr. Barnard: Yes, we have so stipulated.

The Court: Then this may be admitted, I understand it is marked as exhibit 1.

Mr. Bird: I might say that the prayer in the complaint for Mr. Horn was an approximation and these [4] figures are different; we didn't have the full payroll records on Mr. Horn when we filed the complaint.

(Testimony of Elbert Shaw.)

The Court: Do you wish to have your complaint to be amended to conform with the figures you have here?

Mr. Bird: That is a good idea.

Mr. Barnard: We have no objection.

The Court: It may be amended and those figures will be inserted by the Clerk.

Mr. Bird: That is all, you may examine.

Cross-Examination

By Mr. Barnard:

Q. Now, Mr. Shaw, in the extreme right hand column you have a column headed "wages due," and that is the amount which you found due for that week, but it is subject to the proposition of whether or not the employee was engaged in interstate commerce at that time?

A. That would be true.

Mr. Barnard: That is all.

Mr. Bird: Or in the production of goods for interstate commerce.

The Court: I understand that.

Mr. Barnard: No further questions.

A. V. JOHNSON

called by the plaintiff as an adverse party, after being first duly sworn testifies as follows: [5]

Cross-Examination

By Mr. Bird:

Q. Mr. Johnson, I show you invoices 256 and 257 which are invoices of the Idaho Forestry Products

(Testimony of A. V. Johnson.)

and ask you if you recognize them? A. Yes.

The Court: I think those should be marked.

Q. Mr. Johnson, what are those invoices?

A. They are invoices to Knudsen Builders Supply Company of Salt Lake City and a freight invoice for the same place?

Q. What is the date of those?

A. 8-30-51 on both of them.

Q. And what is the amount on the lumber?

A. \$629.07 and \$173.62 freight.

Q. And that represents a sale by the Idaho Forestry Company which is the same as the Idaho Lumber Company?

A. I might explain on that—Knudsen Builder's supply has an office here in Pocatello and we sold some lumber through them and we make a lot of purchases through them. This lumber was for an employee of theirs in their Salt Lake office and they came and asked me as a special favor would I get this out so that the man might buy lumber at the wholesale cost for his house. It was one of the employees of Knudsen's in their Salt Lake office. My dealings was with the Pocatello office with John Davis of Pocatello. [6]

Q. You knew when you sold that lumber that it was going to be delivered to Salt Lake City?

A. I did—it was as a favor and not in the course of our business.

Q. You sell lumber in the course of your business?

(Testimony of A. V. Johnson.)

A. Not to individuals at that time, it was all wholesalers.

Mr. Bird: I move to strike the answer as not responsive as far as the course of his business is concerned.

The Court: Yes, it may be stricken.

Q. You knew that it was to be delivered to Salt Lake City, Utah? A. Yes, sir.

Mr. Bird: I ask to have that introduced in evidence.

The Court: It may be admitted.

Q. Now, I will show you invoices 1457, 1543, 1153, 1239, 1258, 1304, 1321, 1406, 1444, 1471, 1484 and ask you if those are invoices representing sales by your Company to be delivered out of State?

A. These tickets—the sale on this was between Roger Brothers Seed Company and myself, it was made in Idaho Falls in Rod Rose's office. I took and had the purchase order changed over to Riley Atkinson's for the financial arrangement. I needed help to produce the job. It is all [7] one sale and it was delivered out of the State.

Q. You knew at the time that the lumber left your premises that it was going to go outside the State?

A. It was sold in Idaho, to an Idaho corporation for delivery out of the State.

Q. You knew at the time the lumber left your business that it was going out of the State?

A. At the original time I was not supposed to

(Testimony of A. V. Johnson.)

take it out. I was to sell it to Roger Brothers and it was later arranged that I take it out.

Q. I am talking about when the lumber left your mill. You at that time knew that it was going outside of the State? A. That is right.

A. And your own records show that it was going outside the State, that is right?

A. That is right.

Q. And those invoices total \$11,561.49?

A. I assume that to be right.

Q. Now, the dates shown on those invoices, what are those dates?

A. Those are the dates that it was billed out, the date it was loaded, in other words.

Q. Now, all of this lumber shown on your invoices is lumber produced at the Salmon sawmill?

A. That is right.

Mr. Bird: I ask that these be introduced in evidence. [8]

The Court: They may be admitted. All of them are marked as one exhibit—Exhibit 4.

Q. I will next show you a series of invoices and copies of invoices which have been marked as Exhibit 5, will you explain what those are?

A. The first one is to Rice-Welker, a millwork concern in Boise. It was handled out of Riley Atkinson's office. Almost all of my business was done with Riley Atkinson's Idaho Falls Office through Mr. Cook and he asked me to send this and it went to a Boise millwork house and I assumed that it was within the state, which it is. My arrangements

(Testimony of A. V. Johnson.)

with Mr. Cook at Riley Atkinson's was that we were to not get that sawmill involved in anything that would be construed as interstate, and my arrangements were with him and we have delivered all of the lumber and sold probably eighty per cent of it and used Riley Atkinson's for the financial convenience.

Q. When you delivered that lumber did you know——

A. I knew right exactly where it was going.

Q. I didn't finish my question.

A. Excuse me.

Q. When you delivered or sold this lumber did you know that the firm which produced the articles was going to ship some of the goods which they made from this lumber, outside of the state? [9]

A. I talked to Daryl Cook about it and he said that it was a very similar outfit to the one we operate at Idaho Falls and there was no reason to assume that any portion of it would go out of the State, it is on local construction within Boise—the millwork.

Mr. Bird: Can we agree that Riley Atkinson's records show that some one hundred and odd dollars worth of windows made by this company were sold out of the state?

Mr. Barnard: We will stipulate this: That the defendant sold the lumber represented by these two invoices to the Wood Products Company and the Rice-Welker Millwork Company which is one and the same concern, that is, they changed their name

(Testimony of A. V. Johnson.)

after the first shipment, and that they manufacture millwork and that some of the products of that company—window sash and some thing of that sort has been shipped out of the state, but we have no knowledge as to whether or not any of this lumber—this particular lumber went into those sash or doors.

Mr. Bird: It is so stipulated.

The Court: And the exhibit may be admitted.

Q. Now, I show you your invoice 1184 which has attached to it a copy of an order from Riley Atkinson and ask you if you recognize that—first I will have it marked Exhibit 6 for identification. [10]

A. I don't recognize this order—I don't definitely remember this but I assume it is correct.

Q. Is there any way in which you can check your records and know whether you received an order from Riley Atkinson, of which that white paper is a copy?

A. No, there would only be the one copy and they are thrown away but we assume it to be right.

Mr. Bird: Will you agree to that Mr. Barnard?

Mr. Barnard: We will stipulate that they received an order from Riley Atkinson in accordance with that instrument there for pickup at the mill.

Mr. Bird: Then it is so stipulated, that is, with reference to the white paper.

Q. Now, that, on its face shows that the purchaser of the lumber, which was to be sold from your mill, was an out of state concern?

A. In that instance, yes.

Q. And did you find out when you sold it whether

(Testimony of A. V. Johnson.)

or not the lumber was going to go outside the state?

A. No, I didn't, but there is some things that just passes me I can't tend to everything.

The Court: That exhibit may be admitted. I believe that was referred to as Exhibit 6, I notice it is marked as 3-A.

Mr. Bird: That is right.

Q. Mr. Johnson, was there any change in the type of your [11] business or the nature of your customers this spring, at the time concerning which we made this stipulation—had your business changed so that you were selling—

The Court: Was this after this action?

Mr. Bird: Yes.

The Court: It would not be material here.

Mr. Bird: I thought it might if it was shown that the conditions hadn't changed as to the amount of goods being sold and so on.

The Court: I don't think it would be material, of course, if there is no objection—

Mr. Barnard: I was about to object but I thought that he had not finished his question, I didn't know just what he was leading up to.

The Court: I have already ruled and it is useless to make your objection. This is a good deal like a railroad company having an accident and then later go out and fix things up after the wreck.

Q. Well now, Mr. Johnson, you produced lumber during the winter time and stockpiled it for sale in the summer time is that correct?

A. That is right.

(Testimony of A. V. Johnson.)

Q. In other words, you cut more lumber during the winter time than you sell?

A. That is right. [12]

The Court: I notice the last exhibit which I called your attention to—that exhibit is attached to another which at some time had been marked 3-a but the exhibit is numbered 6 here.

Q. Now, the lumber which went into these pallets and bean boxes which were sold to Roger Brothers Seed Company which sales are shown on the orders and invoices, that lumber was produced, starting in December, January and February?

Mr. Barnard: That is objected to on the ground that it is immaterial unless the defendant knew at the time the lumber was produced that it was going to be produced for something going out of the state. If he had knowledge that it was going out of the state or the products made from it were going out of the state, then he would be under the coverage of the act, but until he has that knowledge, no matter if it does go out of the state later, of course, he is not chargeable with it at that time.

The Court: He may answer.

A. I don't believe that I had the order on Rogers Brothers in February if my memory serves me correctly, and those were made out of fir which dries very fast—our drying lumber is generally all yellow pine, and the fir, there is no reason for carrying it that length of time.

Q. Your own records show that in March you

(Testimony of A. V. Johnson.)

assigned lumber to be used for these bean boxes? [13]

A. That's approximately right—that is when we got the order but we never had any intention, and we never cut any until that time.

Q. You admit that at least in March you were producing lumber—that sawmill up there was producing lumber which was used in these bean boxes?

A. That's right.

Q. Now, do you keep lumber segregated as between lumber which you sell outside of the state and lumber which you sell in the state?

A. In that instance, yes.

Q. You kept a separate pile for every stick of lumber that went outside of the state?

A. That's right. Riley Atkinson advanced us the money and they were marked by numbers with a tab on the end of them and they were marked "for bean boxes," and they advanced the money on them.

Q. They advanced money on other lumber too didn't they?

A. That is right, that was all Ponderosa pine and none of that, I know, could have went in the bean boxes because they was all fir, and the fir that was produced prior to that in the winter was shipped as surfaced green and rough, that came out of production before that time. It is very seldom that a fir board will remain there over thirty days.

Q. What I am getting at is this—did you mark this lumber [14] in separate piles because Riley

(Testimony of A. V. Johnson.)

Atkinson had loaned the money on it or because you expected that it was going out of the state?

A. Because Riley Atkinson had loaned the money on it.

Q. So you made no segregation between the lumber that you expected to go outside the state and the lumber which you expected to sell locally?

A. We expected to send no lumber out of the state.

Q. Did you make any segregation between the employees who work on the lumber that went outside of the state and the employees which worked on lumber sold in the state.

The Court: I don't think that is a fair question. I want this witness, or any witness, to have a break, he has told you that he didn't manufacture any lumber that he knew was going out of the state and you keep asking him that same question. It is kind of a catch question.

Mr. Bird: I didn't mean it that way.

The Court: No, I know that you didn't intend it that way but I don't think that he should be required to answer it after his other answers here. You may go ahead however—Mr. Reporter, you read the question to him.

(Question read by reporter.)

Mr. Bird: Perhaps I should rephrase the [15] question.

A. I will answer it.

The Court: Go ahead.

(Testimony of A. V. Johnson.)

A. We know that after I received that order we piled that lumber—Riley Atkinson made advances of money and when they advanced the money I started to pile lumber. We know that the lumber was dried approximately sixty days before we used it, so we know that we quit producing lumber for that job about sixty days before the last of the job was delivered and we made no effort whatsoever to do any interstate commerce at any time and we made every effort to avoid it.

Q. You didn't have a special group of employees to work on those boxes whether you expected them to go out or whether they did in fact go out—you didn't have a special crew that did that work and a special crew that did the rest of the work?

A. No, sir.

Q. The employees indiscriminately worked on that and worked on other items?

A. The men in the planing mill would have never worked on them. There was no reason for them to work on that job, it was done in the sawmill and the shop.

Q. Didn't they have to plane the lumber?

A. It was planed in the sticker, it was cut to length and run through the sticker in the shop, it didn't go through the planing mill. [16]

Mr. Bird: Are you contending that some of these employees had special duties to perform here.

Mr. Barnard: I don't know what their duties were, these men named.

(Testimony of A. V. Johnson.)

Q. Mr. Kramp worked on the green chain didn't he? A. That is right.

Q. So he would have worked on the lumber?

A. That is right.

Q. Now, Pierce worked around the equipment and operated the sawdust truck, is that right?

A. He hauled the wood and the sawdust and delivered it around town on local deliveries for consumption as fuel by the people of the town.

Q. He also worked cleaning up around the saws?

A. Just to get the sawdust on the truck and sweep up under the bin where he slopped it off the truck.

Q. His work in that connection would be just as much on the lumber that was used in the bean boxes as any other?

A. It was disposing of waste from the mill that was used for consumption as fuel by the towns people.

Mr. Bird: They are going behind the stipulation now—they admitted that he was engaged in the production of lumber, now they are trying to say that he wasn't.

The Court: I don't take it that way. This question that you ask now, goes to whether this man that you mentioned was engaged in doing anything in connection [17] with the manufacture of the bean boxes that were sold to the Rogers Seed Company and shipped out of the state. He answers that his job—and I assume that is for the Court to

(Testimony of A. V. Johnson.)

decide—but he answers that his job was to take the sawdust and sell it or deliver it to the local townspeople. I think he has answered it the way he understands it.

Mr. Bird: The only trouble is that I dismissed a witness—I was relying on the stipulation that he was engaged in producing lumber.

The Court: That stipulation stands. He was engaged in producing lumber.

Q. To the extent that Pierce's duties constitute the production of lumber, he was just as much engaged in the production of the lumber which was used in these bean boxes and pallets as in the production of lumber that was used for other purposes?

Mr. Barnard: That I am going to object to as a question for the Court to determine under the evidence here.

The Court: He was hauling the sawdust from all of the lumber, there is no question about that. If you want him to answer, he may—the Court has control of the matter. Go ahead and ask your questions.

Q. Was his work related only to the lumber which was sold [18] locally or was it also related just as much to the lumber that was manufactured into these bean boxes?

A. His job was the disposal of all waste from the sawmill.

Q. Now, what about Westfall?

A. He operated the planer, but he came back

(Testimony of A. V. Johnson.)

at night at their suggestion. I told them to hire some more men and they said, "let us come and do it at night, we would like to earn the extra money," and he came back at night and worked in the shop on bean boxes, that is right.

Q. Now, what about Horn?

A. I doubt that he had more than five days in there, other than the production of lumber. He operated the trimmer.

Q. He would have been——

A. He may have nailed pallets for a little while.

Q. But he would have been engaged in the production of the lumber used in the pallets and bean boxes?

A. In the production of the lumber, that's right.

Q. You made your first delivery of the pallets outside of the state sometime in May?

A. That is approximately right, yes.

Q. As shown by the invoice? A. Yes.

Q. When you made this sale—this agreement to produce these pallets and bean boxes, when was that?

A. That was in February if my memory is right. [19]

Q. In February?

A. The latter part of February.

Q. At that time did you know whether the bean boxes would be sold outside the state—when you got the order in February?

A. At that time I went over and I talked to Mr. Rose about the order and I understood when

(Testimony of A. V. Johnson.)

I went to see him that they were going to be for one of their local warehouses. I took the order subject to approval by the next day and I went over and seen some attorneys and we went and looked in those commerce clearinghouse books if there was any place that it was stipulated there that we would be engaged in interstate commerce and we couldn't find any place that it was. If it was shipping containers it was interstate commerce but this was warehouse equipment, these boxes and pallets, not to be shipped on. We couldn't find where it was specifically listed and I called them back and told them to change the order over to Riley Atkinson's company and I would accept it and bill them?

Q. Why did you tell them to change the order to Riley Atkinson?

A. For the financial arrangement—I had also talked to Daryl in the meantime.

Q. I was asking you whether when you made the order, or took the order in February, 1952, you knew whether the pallets and bean boxes were going to leave the state? A. I did. [20]

Q. Did you, at that time, know they were going to leave the state?

A. I did, it wasn't I that was to take them out but I knew that they were to leave the state.

Q. So you knew, starting in February, 1952, that your firm was producing lumber and making it into pallets and bean boxes and that those bean boxes were going to leave the state?

(Testimony of A. V. Johnson.)

A. I knew that, yes.

Q. Now, before February, 1953, did you know that some of your sales were going out of the state—for instance, this sale to Utah?

A. That one to Knudsens, yes, but I thought that one was perfectly all right. We made every effort to not be engaged in interstate commerce. We made every effort at all times.

Q. But at that particular time and in that instance you knew that you were selling goods outside the state didn't you?

A. I went up and had the law read to me that it is not in the regular course of my business that it wasn't. I had that read to me, parts of that law, several times.

Q. I am not concerned with what you thought the law was, I am concerned with what you knew the facts to be.

A. I knew that I shipped it out, right, yes.

Q. And you had made no records and made no segregation between the employees who worked on that lumber that was eventually sold out of the state and employees that didn't? [21]

A. No.

Mr. Bird: That is all.

Mr. Barnard: I believe I will reserve my questions until we open our defense.

Mr. Bird: I have no further testimony. We will rest.

The Court: You may call your first witness Mr. Barnard.

Mr. Barnard: Yes, I will call Mr. Johnson.

A. V. JOHNSON

called as a witness for the defendant, after being heretofore sworn, testified as follows:

Direct Examination

By Mr. Barnard:

Q. Mr. Johnson, these exhibits 2 and 3—the sale made at the request of the Knudsen Builders Supply Company at Salt Lake City, Utah. Did you state that the Knudsen Builders Supply Company had an office in Pocatello?

A. That is right.

Q. Did you have considerable business with that concern at their Pocatello office?

A. Yes, at one time we started selling them lumber, they sold four or five loads around Ketchum and like that, but their loads were so specified that we just couldn't handle them—we do a lot of wholesale buying from them in our Idaho Falls operation, plywood and such items. [22]

Q. Explain where the request came from, and the circumstances regarding those two invoices, exhibits two and three?

A. John Davis called me up and asked me to send this and I told him that I wouldn't, and he said that Art Knudsen of Salt Lake asked to have it sent down as a favor to an employee to help him secure a home to live in, and I said "well I will take it."

Q. Now then, was that operation in the ordinary and usual course of your business?

(Testimony of A. V. Johnson.)

Mr. Bird: We object to that on the ground that it calls for an opinion and conclusion of the witness, he has already testified that his business is selling lumber.

The Court: Didn't you ask him that same question?

Mr. Bird: No, I objected to it and asked to have it stricken as not responsive.

The Court: I think I understand this transaction. He has said that he sold it to them and they asked him to ship it out of the state, he knew that—you may proceed.

Q. In the course of your business, from the time it began up there, Mr. Johnson, have you ever had any other similar transaction? A. No.

Mr. Bird: I should have spoken sooner, but [23] I do want to object to that question on the ground of vagueness, I don't know what he means by similar transactions.

Mr. Barnard: Perhaps I can clear it up.

Q. Incidents, Mr. Johnson, where you were performing any favor to anybody, favors of that nature?

Mr. Bird: I object to that on the ground that it is irrelevant and immaterial.

Mr. Barnard: I think that is the point here your Honor—this is a special transaction.

The Court: The Court has control of this matter, I will let him answer.

A. Our connection with Knudsen Builders Supply was——

(Testimony of A. V. Johnson.)

Q. The question was, have you ever done that for any other concern during the entire course of your business?

A. No—our business was selling through these wholesalers to retail lumber dealers, except to John Homer of Idaho Falls which deal was that he was building a housing project and he helped me on the financial arrangements when we put the mill in and I told the lumber dealers when I started the mill that he would have to be excluded from our arrangements, that he got his lumber regardless. That was all delivered in Idaho Falls, it was an Idaho Falls building project. This deal was a favor to an employee and the others were all to lumber yards for resale in their local communities. [24]

Mr. Bird: The witness has answered the question but he answered a lot of other questions too, and I did not have a chance to object and I now move to strike insofar as it the rest of the sales are concerned.

The Court: I will let it stand subject to your objection and I will consider it as to its materiality when I consider the case.

Q. Calling your attention to Exhibit 5, do you have any knowledge Mr. Johnson that any part of the lumber shipped on the invoices which went to Boise, ever went out of the state?

A. No.

Q. When you shipped that lumber did you have any information in any way that it might be shipped out of the state?

(Testimony of A. V. Johnson.)

A. No, if I had I wouldn't have shipped it.

Q. I show you Plaintiff's Exhibit 6 and ask you where that lumber was delivered as far as you are concerned? A. I do not know.

Q. Can you state whether it was picked up at your mill?

A. It was because of the invoice.

Q. You had nothing to do with shipping it out of the state or anything of that kind?

A. I did not.

Q. Do you know where it went?

A. I do not. [25]

Mr. Bird: That is which invoice now?

A. This is Norman Thompson Lumber Company, Warren, Utah.

Q. Do you recall that particular transaction?

A. I do not.

Q. To refresh your memory—strike that—I show you now Exhibit 4, the invoice covering the pallets and bean boxes, I will ask you how many contracts you had with the Rogers Brothers Seed Company? A. One.

Q. And were all those shipments made pursuant to that one contract? A. That's right.

Q. Were some of the pallets and bean boxes under the original contract delivered in Idaho Falls?

A. Right.

Q. And these others represented by these invoices did go outside the state?

A. That's right.

Mr. Barnard: That is all, you may examine.

(Testimony of A. V. Johnson.)

Cross-Examination

By Mr. Bird:

Q. Mr. Johnson, you sell to a lot of different customers don't you?

A. No, there was very few, now we have branched out more—the lumber yards couldn't take our output and we have had to go right to the customer to unload our production. [26]

Q. During this period of 1951 and 1952 you sold lumber which was delivered to a good many different firms?

A. Almost the entire amount went through Riley Atkinson because he was making financial arrangements, I had to have the money the minute the lumber was produced.

Q. Who sold it.

A. I sold most of it and took the orders to Riley Atkinson and they wrote another order on it and approved the credit on it and I delivered it.

Q. You sold it to a lot of different firms didn't you?

A. Mostly in Pocatello and Idaho Falls and the Ketchum Builders Supply.

Q. Did you personally inquire as to what each one of these customers was going to do so as to make sure that none of this lumber left the state?

A. I knew the nature of their businesses. I had no reason to believe that anything would leave the state.

Q. It is true isn't it that Idaho produces a lot more lumber than it uses within the state?

(Testimony of A. V. Johnson.)

A. That's right.

Q. You knew that was true?

A. That is right.

Q. It is a lumber exporting state?

A. That is right.

Q. I would like to know how you determined, if you did [27] with certainty that your lumber didn't leave the state?

A. At Salmon that is a very small community and there is a very limited amount of lumber and the very maximum that I can hope to get on the present forest service quota is two million feet, and I set up for four million—when we done it we expected the quota to be increased and I knew that any place that I delivered outside of the state I would have to deliver from Salmon to the rail head for no compensation. I could only get the same price at the rail head as Bonner, Missoula or Darby or any of those other places.

Q. I am not asking you how you knew who you delivered it to, I am asking how you could have known to a certainty that none of the people that bought it from you sent it outside or kept it in Idaho?

The Court: That's what I thought he was explaining. However, if you don't want that I will stop him.

Q. You understand my question?

A. Yes, I knew that when I built that sawmill that all my production from the sawmill had to be trucked out. It was the only way we could operate

(Testimony of A. V. Johnson.)

because we couldn't stand the cost that we would lose from Salmon to the rail head. I knew that it all had to be trucked and by that basis I selected where I was going to sell it and I sold it there to try to stay away from interstate commerce. [28]

Q. I still don't understand how you knew whether some of your customers might not ship some of this lumber outside the state?

A. A customer might come down from Jackson, Wyoming and go into the lumber yard at Idaho Falls and buy a two by four and haul it back to Jackson—there are several sawmills in Jackson, and that would be the only place I know of that it might go.

Q. This Rice Welker Company, you knew about them didn't you?

A. That was a millwork concern in Boise and doing very similar work to what we do, custom work on housing projects, I had no reason to believe that it was going out of the state.

Q. I don't understand which you are contending for—one that a mill like yours would be normally expected only to have its customers within the state because of your locality and economic setup or whether you actually went around and checked to make sure.

A. No I didn't. I know the nature of the people's business that I sold to and I tried to confine it to the ones that I knew the nature of their business, that there should be no question.

(Testimony of A. V. Johnson.)

Q. But at the same time you were producing and manufacturing these pallets and bean boxes which you knew were going outside the state? [29]

A. Yes, and I thought that I had checked to my satisfaction that it wasn't in the regular course of our business, and that it was something that we could do with that building that was setting vacant that we didn't have money enough to open up and there was some salvage there.

Q. Did you think you could sell lumber to someone who was in Idaho that you wouldn't be covered by the Fair Labor Standards Act even though they shipped it outside the state?

A. If they shipped it out unbeknown to me.

The Court: I think we have covered that fully. He has been asked that a good many times.

Q. I would like to get it clear, I really don't understand you. Did you think that the fact that the sale occurred within Idaho was enough to prevent the Fair Labor Standards Act from applying to employees engaged in producing the lumber?

A. On the boxes, yes, because Rogers Brothers moved their equipment from warehouse to warehouse and there is nothing in my knowledge that it might not wind up in Idaho any more than in Colfax. They sent them there at that time to harvest beans with and they harvest beans in Idaho Falls afterward. I had no reason to believe that they wouldn't come to Idaho Falls—they told me that in their north Idaho Falls plant they were going to use boxes.

(Testimony of A. V. Johnson.)

Q. Maybe I misunderstood your earlier testimony. I thought you said that in February when you took the order that [30] you knew that they were going to be shipped out of the state?

A. We knew where they were going to be used first, that's right, that they were going to be used in Colfax, Washington, to harvest beans.

Q. Then you thought the fact that you sold them here would keep the Fair Labor Standards Act from applying even though the good were shipped to Colfax?

A. I have too many things to do to think of all them things.

Q. Mr. Johnson, your reason for restricting the sales of lumber to people in Idaho was because you didn't want to have the Fair Labor Standards Act apply, is that correct? A. That is right.

Q. Did you think that the fact that the sale was made in Idaho would keep the Fair Labor Standards Act from applying?

A. I thought it was up to me to see that I didn't get into anything that went out of the state if I knew it, that is the way that I felt about it.

Q. You knew that the pallets were going out?

A. That is right, and I also went up and checked on it and we couldn't find any place where it was specifically covered. If it was shipping containers, yes—but it was warehouse equipment and we couldn't find anything on it.

Q. So far as the pallets and the bean boxes were concerned [31] you thought that the Fair Labor

(Testimony of A. V. Johnson.)

Standards Act wouldn't apply if you made the sale in Idaho even though the goods went outside the state? A. I didn't know.

Q. You thought so? A. I thought so.

Q. So far as the lumber was concerned did you think that the Fair Labor Standards Act wouldn't apply if the sale was made in Idaho even though the goods went outside the state?

A. No, I knew that I shouldn't send it out of the state and I made every effort to prevent it.

Q. You thought there was some distinction then between bean boxes and pallets and the lumber?

A. As they were warehouse equipment, yes.

Q. How long were the employees engaged in working on these bean boxes and pallets from the time they started making the lumber until they finished the boxes?

A. The sawmill itself would be about two months before the first delivery and would have ended about two months before the last delivery, and the shop itself probably about two weeks before the first delivery and until the day of the last delivery.

The Court: We will take a recess at this time for ten minutes. [32]

December 10, 1953—3:50 P.M.

Q. Then to clear up this business about the bean boxes—the lumber employees started to work on the bean boxes in March?

A. That is right.

Q. That is, the lumber for the bean boxes?

(Testimony of A. V. Johnson.)

A. Right.

Q. And they worked up to within two months of the last delivery? A. Right.

Q. And the shop employees worked, starting when?

A. About two weeks before the first delivery, until the date of the last delivery.

Q. Westfall worked in the shop?

A. At night—he worked in the planer in the day time and came back over there in the evening and worked there in the evening.

Q. The other three, Kramp, Horn and Pierce, they worked where?

A. They worked in the sawmill.

Q. After August what was your intention with respect to the sale of goods—of lumber which would result in goods which would be delivered outside the state. Did you at that time intend to and expect to sell lumber which would be delivered outside the state if you got a purchase order?

A. At no time did I expect to sell lumber outside the state.

Q. You did sell lumber outside the state? [33]

A. Those were isolated cases.

Q. Did you intend to make similar sales which you considered isolated? A. No.

Q. You intended to change your practice and not make any such sales?

The Court: That is not a fair question. I don't like that kind of question, this witness is not a

(Testimony of A. V. Johnson.)

lawyer, he is just a sawmill man here. I think the Court has to protect a witness a little against such questions. That's asking him if he intended to change the way he was doing business.

Q. Did you intend to change your practice with respect to selling lumber which would be delivered outside the state?

The Court: That is the same question and I don't like it, it is asking him to plead guilty to the fact that he was making such sales. Go ahead, there was no objection but I don't like those questions.

A. I never intended to sell any outside the state.

Mr. Bird: That is one of the basic problems in this case your Honor.

The Court: Yes, I know it is a basic problem but this man is a witness here on this witness stand and [34] you are an able attorney, this again is like the old question, asking a man if he is going to quit beating his wife and you expect an answer to it with a yes or no answer. Your question infers that he should plead guilty to what you are charging him with here. I don't like that method of questioning a witness. You go ahead, you know how you should ask your questions just as well as the Court does.

Q. After you completed delivery on this bean box order did you change your sale policy in any way?

A. My sale policy was always to do business within the state. On a lot of these orders I went

(Testimony of A. V. Johnson.)

direct to the contractor or the builder of these projects and I sold the lumber to the managers of these projects through such and such a lumber company, I picked up the requisition there and took it over to Riley Atkinson's and got the credit approved, I filled the order and it was billed through Riley Atkinson, billed to the lumber yard and I took it direct to the project, that was the largest portion of our business, those housing projects in Idaho Falls and Blackfoot and Pocatello.

Mr. Bird: What I am trying to bring out is——

The Court: I understand what you are trying to bring out and I am going to let him answer if they do not object but I don't think the questions are fair questions. [35]

Q. Up until you finished this order you made some sales of lumber which you knew were going outside the state, now, were you, starting in August, were you going to have absolutely a blanket rule where no sales were going to be made where the lumber might go outside the state?

The Court: Now, Mr. Bird, if he answers that question any way that he could possibly answer it—— it is a double barreled question and any way he answers it he would have to admit that he was selling lumber outside the state.

Mr. Bird: He has already admitted that.

The Court: It is not for you to say how the Court would interpret his testimony. I will not interfere with your examination any more, however,

(Testimony of A. V. Johnson.)

I think I should say again, I am sure you know what questions you should ask this witness.

Mr. Bird: I will make one more statement to attempt to clear this matter. I have his answer saying that it is his policy not to ever make any sales outside the state and at the same time I have the fact that he made out of state sales and I am trying to show that it was a policy that wasn't strictly adhered to and that he did expect to adhere to it strictly in the future. Do you get my point, your Honor?

The Court: I think I have been able to follow you all right, and I was only thinking of the form of [36] your questions, however, as I say, I am not going to interfere with you any more. Now, go ahead.

Q. Mr. Johnson, you didn't adhere strictly to a rule of not selling outside of the state?

A. My policy was not to sell any lumber out of the state, I probably made a mistake. I sold one out of the state but my policy afterward was not to sell any lumber out of the state, and it was my policy before but I deviated just to help a friend.

Q. You are talking now about the Salt Lake City deal? A. That is right.

Q. With respect to the pallets and the bean boxes you also deviated?

A. I have already answered that.

Mr. Bird: I have no further questions.

(Testimony of A. V. Johnson.)

Redirect Examination

By Mr. Barnard:

Q. Now, Mr. Johnson, after you finished with the pallets and the bean boxes, did you make any further sales of any kind that, to your knowledge, went outside the state.

A. I did not until this winter sometime when we were on this forty-hour week and I sent a load to Denver.

The Court: No, I would strike that——

Q. Mr. Johnson, I am speaking of the period after you finished the bean boxes and the pallets, prior to the time this action was commenced? [37]

A. No, we didn't make any policy to sell anything outside.

Q. Did you manufacture anything other than these bean boxes and pallets during this period of time, and just plain lumber. Did you manufacture any articles?

A. Lumber and lumber products—we made survey stakes and panels which were mostly used in our shop in Idaho Falls, moulding and such things as that—very small amounts.

Q. I am speaking of your operation at Salmon, did you ever do any other manufacturing there other than these pallets and bean boxes?

A. No—we built three or four cabinets around the town there—probably a couple of them.

Q. Were they installed locally? A. Yes.

Mr. Barnard: That's all.

(Testimony of A. V. Johnson.)

Recross-Examination

By Mr. Bird:

Q. Mr. Johnson, you have a building there which you call a shop don't you? A. That is right.

Q. And you regularly engaged in doing fabrication work in the shop?

A. That is our business at Idaho Falls, but I never could get money enough to finance it at Salmon—to open it up, no. [38]

Q. Is that shop building where you made the bean boxes? A. That is right.

Q. You still have the building?

A. That is right.

Q. You are still trying to get business of a similar type—fabrication aren't you?

A. No, I can't finance that.

Q. You were trying to?

A. I never tried to. I took this one job because it was large enough so I could get help from Riley Atkinson on the financing of it.

Q. You are testifying that you have fully equipped shop up there and have no intention of using it?

A. We had intentions when we started but we ran out of money too early. We had to buy logging equipment that we originally didn't intend to buy and that took the money that we were to operate the shop with.

Q. So you were going to let that shop lay idle?

A. That is right. I loaded up a large portion

(Testimony of A. V. Johnson.)

of the equipment and hauled it to our shop in Idaho Falls.

Q. When did you do that?

A. Must have been around a year ago.

Q. That would be December of last year?

A. Last winter some time.

Q. But your equipment was up there until last December? [39]

A. That's right—I hauled all the sash making equipment out.

Mr. Bird: That's all.

Mr. Barnard: That is all.

The Court: What was the amount of your business in 1951? A. At Salmon.

The Court: Yes.

A. Could I have Mrs. Johnson answer that—I don't know.

Mr. Barnard: I intended to call Mrs. Johnson, your Honor.

RULA JOHNSON

called as a witness for the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Barnard:

Q. Your name is Rula Johnson?

A. Yes, sir.

Q. What is your connection with the Idaho Lumber Company?

(Testimony of Rula Johnson.)

A. I am secretary-treasurer and I keep the books.

Q. Have you kept the books ever since the company started? A. Yes.

Q. When did the company start in business at Salmon?

A. We bought the property in August of 1950 and probably the first sale would have been in September.

Q. In September, 1950? A. Yes, sir. [40]

Q. Mrs. Johnson, have you calculated the total volume of sales from the time the company opened until December, 1952? A. Yes, sir.

Q. What, approximately, is the total volume of sales, including freight, for that period?

A. \$234,000.00.

Q. \$234,000.00.

A. I think that is the figure.

Q. Does that include the freight charged made to the customers? A. All the income, yes.

Q. Do you know approximately what the volume of sales was during the year 1951?

A. Just over a hundred thousand probably \$110,000.00.

Q. Do you know approximately the volume of sale during the year 1952?

A. I think probably \$120,000.00.

Mr. Barnard: That is all.

(Testimony of Rula Johnson.)

Cross-Examination

By Mr. Bird:

Mr. Bird: At a previous hearing we ran a tape and made a total of monthly sales; there was a discrepancy between the tape and this figure because ours didn't [41] include the freight. I would like to have this as a part of the record?

Mr. Barnard: That is no objection.

The Court: It may be admitted.

Mr. Bird: It may be marked as the next exhibit in order and it is agreed that it shows the monthly total and the yearly total of the sales of goods. It doesn't include certain miscellaneous income and freight bills which her figures include?

The Court: I think I understand, you may proceed. I don't think it is very important.

Mr. Bird: I have no questions.

Mr. Barnard: The defendant rests.

Mr. Bird: I have nothing further.

The Court: There is no necessity of a transcript in this case, it is submitted mostly on exhibits with only the two witnesses.

(Remarks of counsel as to time for filing briefs.)

The Court: You may have thirty days, and thirty days to reply and then fifteen if there is any necessity for further reply to the defendant's [42] brief.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I further certify that I am the person who took in shorthand, the evidence submitted and the proceedings had in and about the trial of the above-entitled cause, and

I further certify that I thereafter transcribed the same into longhand (typing) and that the foregoing transcript consisting of pages number to 42 is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In Witness Whereof, I have hereunto set my hand this 3rd day of May, 1954.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed May 21, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby

[Endorsed]: No. 14406. United States Court of Appeals for the Ninth Circuit. James P. Mitchell, Secretary of Labor, United State Department of Labor, Appellant, vs. Idaho Lumber Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed June 30, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14406

JAMES P. MITCHELL, SECRETARY OF
LABOR, UNITED STATES DEPARTMENT
OF LABOR,

Appellant,

vs.

IDAHO LUMBER COMPANY, INC., a Corpora-
tion,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of this Court, appellant makes the following statement of the points on which he intends to rely:

1. The lower court erred in making Findings of Facts Nos. 4 and 5 and in making its Conclusions of Law.

2. The lower court erred in failing to find as a fact that appellee's employees who were engaged in the production of goods, some portion of which appellee knew or had reasonable grounds to anticipate would move outside the state, were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. The lower court erred in failing to conclude, as a matter of law, that appellee's employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standard Act.

4. The lower court erred in dismissing the complaint and in failing to grant the judgment for back wages prayed for in the complaint.

/s/ STUART ROTHMAN,
Solicitor;

/s/ KENNETH C. ROBERTSON,
Regional Attorney;

/s/ BESSIE MARGOLIN,
Chief of Appellate Litigation, United States Department of Labor, Attorneys for Appellant.

[Endorsed]: Filed July 27, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO ORIGINAL EXHIBITS

The parties hereto respectfully request that the following designated exhibits be considered by the Court in their original form, and that the Court dispense with their reproduction in the printed transcript of the record:

Plaintiff-Appellant's Exhibits 1, 2, 3, 4, 5, 6 and 7.

Dated: August 13, 1954.

/s/ STUART ROTHMAN,
Solicitor;

/s/ BESSIE MARGOLIN,
Chief of Appellate Litigation;

/s/ KENNETH C. ROBERTSON,
Regional Attorney, United States Department of
Labor, Attorneys for Appellant.

ALBAUGH, BLOEM,
BARNARD & SMITH,

By /s/ GEO. L. BARNARD,
Attorneys for
Defendant-Appellee.

[Endorsed]: Filed August 18, 1954.